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IN THE
Supreme Court of the United States

October Term, 1963

No. 461

HERBERT APTHEKER and ELIZABETH
GURLEY FLYNN,

Appellants,

v.

THE SECRETARY OF STATE

On Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

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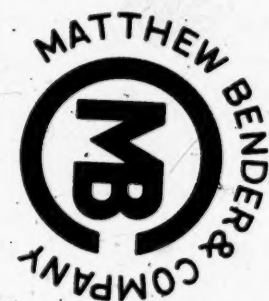
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BRIEF FOR APPELLANTS

Opinion Below

The opinion below (R. 42) is reported in 219 F. Supp. 709.

Jurisdiction

The judgment below (R. 54) was dated and entered on August 2, 1963. Each appellant filed a notice of appeal in the court below on August 9, 1963 (R. 55, 56). The Court noted probable jurisdiction on December 2, 1963 (R. 57).

The District Court had jurisdiction under D. C. Code, secs. 11-305 and 11-306; 28 U. S. C. 2201, 2282 and 2284; and sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009.

Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. 1253.

Statute Involved

The relevant provisions of the Subversive Activities Control Act of 1950, as amended (herein called the Act), are set forth in the Appendix to this brief.

Question Presented

Whether section 6 of the Subversive Activities Control Act, 64 Stat. 993, 50 U. S. C. 785, is unconstitutional, on its face or as applied.

Statement of the Case

This appeal is from a final order (R. 54) of a three-judge court of the United States District Court for the District of Columbia granting the motion of the Secretary of State (herein called the Secretary) for summary judgment, and dismissing appellants' complaints.¹ The complaints (R. 1, 16) sought judgments declaring section 6 of the Act unconstitutional, enjoining the Secretary from continuing in effect his revocation of appellants' passports, and requiring him to reissue passports to them.

The relevant facts are not in dispute (R. 45).

Appellants are citizens of the United States by birth and on January 21, 1962, were the holders of United States passports (R. 1, 5, 7-8, 17, 20, 23).

On April 20, 1953, the Subversive Activities Control Board (herein called the Board) issued an order requiring the Communist Party of the United States to register as a Communist-action organization under section 7 of the Act. This order became final on October 20, 1961 (R. 43). See *Communist Party v. S. A. C. B.*, 367 U. S. 1 (herein some-

¹ Appellants commenced separate actions which were consolidated in the court below (R. 32).

times called the *Party* case), rehearing denied, Oct. 9, 1961, 368 U. S. 871; Act, sec. 14(b)².

Section 6(a) of the Act makes it unlawful for a member of an organization to apply for or use a passport with knowledge or notice of the issuance of a final order requiring the organization to register as a Communist-action or Communist-front organization³. Section 6(b) makes it unlawful for an officer or employee of the United States to issue a passport to any person who he knows or has reason to believe is a member of an organization which has been finally ordered to register as a Communist-action organization. Each of these offenses is punishable by imprisonment for five years and a fine of \$10,000. Sec. 15(c).

On January 22, 1962, the Acting Director of the Passport Office notified appellants that their passports were revoked because the Department of State believed that their use of the passports would violate section 6 (R. 11-12, 26). Appellants requested administrative review of this action pursuant to Departmental regulations, 22 C. F. R. Chap. 1, Part 51 (R. 14, 29, 35, 36-37).

At the administrative hearings, the Department introduced evidence that each appellant was a member of the Communist Party and had notice of the issuance of the final registration order against it by virtue of the publication of that fact in the Federal Register. Appellants offered no

² Under section 14(b), the Board's order became final ten days after the mandate in the *Party* case issued. The mandate issued on October 10, 1961.

³ Section 6 uses the term "Communist organization," which is defined by section 3(5) to include Communist-action, Communist-front and Communist-infiltrated organizations. However, Communist-infiltrated organizations are not subject to a registration requirement. See sec. 7. The notice requirement of section 6(a) is satisfied by publication in the Federal Register of the fact that the registration order in question has become final. Sec. 13(k). Notice of the finality of the registration order against the Communist Party was published in the Federal Register on October 21, 1961.

evidence (R. 44, 34). The hearings were followed by decisions of the Director of the Passport office affirming the revocations (R. 12-14, 27-28).

Appeals to the Board of Passport Appeals resulted in a finding in each case that "there is a preponderance of evidence in the record to show that at all material times [each appellant] was a member of the Communist Party of the United States with knowledge or notice that such organization has been required to register as a Communist organization under the Subversive Activities Control Act." On the basis of these findings, the Board recommended affirmance of the decisions of the Passport Office. The recommendations were approved by the Secretary on October 18, 1962 (Flynn) and November 23, 1962 (Aptheker). The Secretary ~~adopted~~ the finding as to each appellant quoted above and confirmed the revocations on the ground that use of the passports by appellants would violate section 6 (R. 14-16, 29-31, 44).

Dr. Aptheker is a well-known scholar in the fields of history, political science and sociology. At the time of the administrative hearing, he was editor of *Political Affairs*, the theoretical organ of the Communist Party. He is the author of fourteen books and has edited or contributed to several others, including the official History of the Army Ground Forces in World War II. He is also the author of some thirty pamphlets and numerous articles and reviews in scholarly journals. He has lectured at many universities, colleges and other forums. In 1959 and 1960, he visited Europe, where he lectured before various learned academies and universities. In 1961, he delivered papers before the Japanese Historical Society in Tokyo. The revocation of his passport has prevented him from accepting invitations to attend a world gathering of historians at Dresden, to deliver a series of lectures on the American Civil War at Humboldt University, and to attend a conference of scholars in Accra for a discussion of the projected *Encyclopedia Africana*. His inability to travel to Europe also has denied him access to overseas archives and depositories needed for

his historical works, including further volumes of the *History of the American People*, the first two volumes of which have been published (R. 7-9).

Dr. Aptheker desires to travel to Europe and elsewhere to pursue his historical studies, attend meetings of scholars and learned societies, exchange opinions with fellow historians, lecture at foreign universities, and observe conditions and gather material for his writing and lecturing in this country (R. 9-10).

The court below found on the basis of the administrative record that Miss Flynn was chairman of the Communist Party (R. 52). For many years, she has written a weekly column for the newspaper, *The Worker* (formerly *The Daily Worker*), under her by-line. She is the author of two books, including the first volume of a planned two-volume autobiography. She lectures extensively throughout the United States. She has made a number of trips to Europe and desires to travel there again for rest and recreation, to gather material for use in writing for and speaking to American audiences, and to lecture to European audiences (R. 23-24).

The denial of passports to appellants makes their travel unlawful (R. 49; *infra*, p. 12). Because of the basis for the Secretary's action, it would be futile for appellants to apply for new passports. Moreover, any such application would invite criminal prosecution for violation of section 6 (R. 3, 5-6, 18, 21, 46).⁴

⁴ The passports which the Secretary revoked would have expired by their terms on December 9, 1962 in the case of Dr. Aptheker and on March 9, 1963 in the case of Miss Flynn (R. 44, 36, 37). No claim of mootness on that account has been made, or would be warranted. The controversy as to the validity of section 6 and the determination of the Secretary that appellants are ineligible for passports still remain. Mootness is precluded by the short-term license or order doctrine. *Motor Coach Employees v. Missouri*, 374 U. S. 74, 78; *Ford Motor Company v. United States*, 335 U. S. 303, 313; *Southern Pac. Term. Co. v. I.C.C.*, 219 U. S. 498, 514-15. The doctrine is fortified here by the fact that under section 6 appellants cannot reapply for passports without facing criminal prosecution.

The sole ground advanced below for appellants' challenge of the Secretary's action was that section 6, on its face and as applied to them, is unconstitutional (R. 3, 18, 46). Because of the constitutional issue and the requests of appellants for injunctions requiring the Secretary to reissue passports to them, a three-judge court was convened, with the consent of the Secretary, pursuant to 18 U. S. C. 2282 and 2284 (R. 43).⁵

The *Party* case held (at 79) that it was premature, on review of the Board's registration order, to consider any of the provisions of the Act other than the registration requirement. The Court stated (*ibid.*), "It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport." Pointing out that if such application were made, appropriate procedures would be available to test the constitutional issues, the Court concluded, "Nothing justifies provisioning those issues now." Accordingly, this appeal presents one of the constitutional questions reserved in the *Party* case.

⁵ The injunctions sought by appellants on the ground of the unconstitutionality of section 6 would restrain its enforcement, operation and execution by requiring the Secretary to reissue passports to appellants without regard to whether they are members of the Communist Party and notwithstanding that he has reason to believe that they are, as he found, members of the Communist Party. A three-judge court was therefore required. *Schneider v. Rusk*, 372 U. S. 224; *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713; *Florida Lime Growers v. Jacobsen*, 362 U. S. 73; *Bauer v. Acheson*, 106 F. Supp. 445. Cf. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 152-55.

Summary of Argument

1.

United States citizens are prohibited from travelling outside of the Western Hemisphere without a passport, and for the most part may not enter foreign countries without a passport. Accordingly, the denial of a passport is a denial of the right to travel.

"The right to travel is a "liberty" of the citizen, protected by due process. Section 6 must, therefore, comply with the due process requirements that a deprivation of liberty shall not be arbitrary and that the means selected shall have a real and substantial relation to the object sought to be obtained.

The asserted objective of section 6 is to safeguard the national security by closing off a means of communication between American and foreign Communists, found to be a prerequisite to the success of supposed designs of the world Communist movement against our government. There are no legislative findings or facts which could justify section 6 as a regulation of foreign relations.

A.

Section 6 establishes a conclusive presumption that all members of proscribed organizations, simply because of their membership, will be likely to engage in unlawful activity whenever they travel abroad. This irrebuttable presumption is not credible. It is an extreme example of the imputation of guilt from association. Its premise that every member of the Communist Party promotes alleged criminal activity of the Party is contradicted by the dispositions of numerous Smith Act cases in favor of the defendants, and by the fact that the registration proceeding against the Party produced no finding or evidence that the Party engages in illegal acts or advocacy.

Since the conclusive presumption of section 6 is irrational and contrary to common experience, it violates due process and the rule that legislatures may not declare individuals guilty or presumptively guilty of crime.

B.

Section 6 applies despite the absence of guilty knowledge, guilty intent, or even organizational activity of the individual affected. Nor may the individual rebut the presumption against him arising from the fact of membership. This indiscriminate, un rebuttable disqualification contravenes decisions of this Court establishing that individual guilt or disqualification may not be conclusively presumed merely from the fact of membership in the Communist Party or organizations considered to be Communist oriented.

C.

The executive and legislative experience show that the conclusive presumption of ~~section 6~~ is not required by security considerations. This appears from the views expressed by the Department of Justice to the House Committee which was considering the bills that eventuated in the Act and from the federal employee security program under which membership in the Communist Party is only one factor to be considered in deciding whether an employee is disqualified. The approach of the employee security program was taken in passport legislation proposed by the administration following the decision in *Kent* and in the bills then introduced, including one which passed the House.

Section 6 does not represent a considered Congressional judgment to the contrary, but reflects the misapprehension, which prevailed before *Kent* that there were no constitutional limitations on the government's power to withhold passports.

D.

Section 6 would violate due process even if its presumption, that all members of proscribed organizations are security risks, were reasonable. The right to travel being a constitutional liberty, it may not be taken from a citizen, at least in peacetime, merely because of the apprehension that he may engage in unlawful activity.

Denial of the right to travel in anticipation of future misconduct is a form of preventive detention, a practice which is repugnant to the presumption of innocence. Moreover, preventive detention under section 6 is imposed without a jury trial, or a judicial or even an administrative finding that the detainee has criminal propensities. Under our system, freedom of movement may not be denied for the purpose of preventing anticipated commission of crime even to one charged with crime or to aliens under deportation orders. No other major Western democracy imprisons its Communists within its borders, and to do so is contrary to the Universal Declaration of Human Rights.

If preventive detention of Communists and suspected Communists within the country is sustained, there will be no constitutional barrier to their exclusion from interstate travel, their house arrest, or their confinement in concentration camps, all without trial and conviction for the commission of an offense. And these measures can then be applied to other political dissenters.

E.

The Act's justification of section 6 rests on findings that foreign travel by Communists is a prerequisite to the carrying on of activities to further the aims of the world Communist movement, and that the Communist organization in the United States engages in conduct which creates a clear and present danger to the national security.

In the registration proceeding against the Communist Party, the conclusion of the Subversive Activities Control Board that the Party furthers the objectives of the world

Communist movement did not rest on any findings or evidence of foreign travel by American Communists, but rested on findings having nothing to do with travel. Moreover, since the Board did not find that the Party engaged in any unlawful acts or advocacy, the Party's conduct cannot endanger the national security.

Thus, as far as the Communist Party is concerned, the legislative findings are belied by the findings and evidence in the proceeding before the Board. Accordingly, as applied to members of the Communist Party, section 6 effects a purposeless, and therefore invalid, deprivation of liberty.

II.

Section 6 imposes a direct and prior restraint on speech and press by preventing American Communists from communicating with foreign Communists, by preventing appellants and others from acquiring knowledge and ideas abroad, and by restraining appellants from gathering material abroad for communication to domestic audiences. Section 6 also restrains conduct within the ambit of the First Amendment by discouraging association in organizations engaged in advocacy.

A.

Legislation in the First Amendment area is invalid unless the restraint is no broader than the abuse to which it is directed. Section 6 violates this principle because it applies to all Communists regardless of the innocent purpose of their travel and despite the absence of guilty intent, guilty knowledge, and organizational activity.

B.

The section abridges the First Amendment rights of non-Communist members of organizations which have been ordered to register as Communist-fronts. It likewise applies to all persons who may be found to be members of proscribed organizations under such vague and expansive indicia of membership as are contained in section 5 of the

Communist Control Act. Again, section 6(b) compels the Secretary to deny passports to individuals who are not members merely because he has "reason to believe" that they are members. Section 6 also inhibits persons from associating with organizations against which registration proceedings are pending or possible. And by preventing members of proscribed organizations from acquiring information and ideas abroad, the section deprives their potential audiences of the right to hear.

C.

The *Douds* case is inapplicable. The statute sustained in *Douds* had only a tangential effect on First Amendment rights; it involved merely a possible loss of position; it applied only to a few members of proscribed organizations who occupied positions of great power over the economy. In contrast, section 6 directly restrains First Amendment rights, effects a deprivation of "liberty" in the constitutional sense, applies to all members of proscribed organizations, and affects many non-members. Furthermore, in *Douds*, the Court found no basis for questioning the Congressional findings made to justify the legislation. The findings justifying section 6, however, have been negated as to the Communist Party by the Board findings in the registration proceeding against the Party.

III.

The denial of passports to appellants in 1962 was predicated on the 1953 finding that the Communist Party was then a Communist-action organization. Section 6(b) makes that finding conclusive on persons desiring passports and thereby violates the principle of procedural due process that persons may not be deprived of liberty without an opportunity to contest the factual premises on which the validity of the deprivation depends.

Even if appellants are foreclosed from contesting the validity of the 1953 finding, they were entitled at a minimum

to an opportunity to prove that the finding is no longer tenable. Section 6(b) denies any such opportunity.

Since the Communist Party has not registered (and, in all likelihood will not, and cannot be compelled to, register), the Act affords no procedure for a redetermination of the Party's status in the light of changed circumstances. Hence the finding against the Party binds its members in perpetuity for the purposes of section 6(b). The section is therefore a bill of attainder as applied to members of the Party.

ARGUMENT

I. On its face and as applied, section 6 of the Act violates substantive due process.

United States law prohibits citizens from travelling outside of the Western Hemisphere without passport.⁶

⁶8 U. S. C. 1185(b) provides that while a prescribed Presidential Proclamation is in force, "it shall, except as otherwise prescribed by the President * * * be unlawful for any citizen of the United States to depart from or enter * * * the United States unless he bears a valid passport." The prescribed proclamation, Proclamation No. 3004, 67 Stat. C. 31, 18 F. R. 489, made January 17, 1953, remains in force. Among other things, it provides that, "The departure and entry of citizens and nationals of the United States from and into the United States * * * shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations * * * and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require." 22 C. F. R. 53.2 prohibits citizens from departing the United States unless they come within one of the exceptions prescribed by § 53.3. The latter excepts all travel by specified classes of persons (seamen, air crewmen, members of the armed forces and certain minors) and all persons when travelling between the United States and any country in North, Central or South America, other than Cuba. The denial of a passport may likewise prohibit travel within the hemisphere. 22 C. F. R. 53.5 reserves to the Secretary authority to prevent a citizen from departing without a passport, notwithstanding that the latter is destined for a place for which a passport is not required.

Under foreign laws, passports are required of United States citizens for entry into countries outside of this hemisphere and for extended stays in countries within the hemisphere.⁷ Accordingly, denial of a passport is a prohibition of foreign travel. *Kent v. Dulles*, 357 U. S. 116.

Kent established that the right to travel abroad is protected by due process. The Court stated (at 125-26):

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. * * * Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."

Accordingly, section 6 must satisfy the requirements of substantive due process that a deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U. S. 502, 525; *Schwabe v. Board of Bar-Examiners*, 353 U. S. 232, 238-39.

The "object sought to be obtained" by section 6 is stated in section 2 of the Act. Section 2(1) recites that there exists a world Communist movement; which seeks by unlawful methods "and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." Sections 2(5) and (6) find that the world movement establishes and controls Communist-action organizations in various countries whose purpose it is to bring about "the overthrow of existing governments by any available means, including

⁷ See Department of State circulars M-317 and M-264.

force if necessary," and to replace them with "Communist totalitarian dictatorships." Section 2(15) concludes that the "Communist organization in the United States" and the world Communist movement "present a clear and present danger to the security of the United States," necessitating enactment of the legislation.

Against this background, section 2(8) states the justification for section 6 as follows:

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement."

In short, the stated purpose of section 6 was to safeguard the national security by closing off a means of communication between American and foreign Communists which, Congress found, was a prerequisite to the success of the supposed designs of the world Communist movement.

Congress made no finding, and there is no evidence, that travel abroad by American Communists endangers or embarrasses our relations with other countries or otherwise interferes with the management of our foreign affairs. It follows that section 6 cannot be justified as a regulation of foreign relations.* For due process purposes, the section must be judged by its relation to what Congress stated was the intended objective.

In what follows we will show that section 6, on its face and as applied, violates substantive due process because

* Contrast *Perez v. Brownell*, 356 U. S. 44 (statute expatriating citizens who vote in foreign elections upheld as valid regulation of foreign relations); *Worthy v. Herter*, 270 F. 2d 905 (authority of Secretary of State to invalidate passports for travel to Cuba sustained as incident to power of the executive over foreign relations).

it imposes an arbitrary and irrational restraint on personal liberty having no substantial relation to considerations of national security.

A. There is no rational basis for the conclusive presumption of section 6 that members of the proscribed organizations will be likely to endanger the national security if permitted to travel abroad.

Section 6 denies a passport to any person who (1) is a member of an organization against which a final order has issued requiring it to register as a Communist-action or Communist-front organization; and (2) who has "knowledge or notice" of such order. The second requirement is satisfied by publication in the Federal Register of the fact that the order in question has become final. Sec. 13(k). Section 6, therefore, bars individuals from travel abroad solely because of their membership in a described organization.

It is irrelevant under section 6 that the member does not know or believe that the organization is a Communist-action or Communist-front organization as defined in the Act and found by the Board. It is likewise irrelevant that the member has not engaged, and does not intend to engage, in any of the unlawful activity which the Act attributes to the world-Communist movement. Indeed, the member need not have engaged in organizational activity of any kind. Moreover, the section applies to a member irrespective of the purpose of his proposed travel. So here, appellants, who seek to travel for the lawful purposes described in their affidavits (R. 9-10, 24), have been denied that right solely because of the findings that they are members of the Communist Party.

Section 6 thus establishes a presumption that all members of proscribed organizations, simply because of their membership, will be likely to engage in unlawful activity endangering the national security whenever they travel

abroad. This presumption is an extreme example of the imputation of guilt from association. From the bare fact of organizational membership, section 6 imputes the propensity, the capacity and the opportunity to promote conspiratorial activity for forcible overthrow of the government. All this is imputed not only to officers of the Communist Party but to each of its members and to non-Communist members of Communist-front organizations.

Moreover, the presumption is conclusive. The individual is not permitted to rebut it by establishing that, notwithstanding his membership, he is a loyal, law-abiding citizen and that the purpose of his travel is innocent. Section 6 does not even give the Secretary a measure of administrative discretion which might, for example, permit the issuance of a passport for a last visit to a dying parent or for medical care unobtainable in this country.⁹ Instead, a State Department employee who yields to any such humanitarian impulse is liable to conviction and imprisonment for five years. Secs. 6(b) and 15(c).¹⁰

The irrebuttable presumption which section 6 establishes is not credible, is contrary to experience, and is unnecessary to meet the alleged evil. It has no "reasonable relation to the circumstances of life as we know them." *Tot v. United States*, 319 U. S. 463, 468. Communists, like other citizens, travel abroad for recreation, study, business and professional purposes, to visit relatives and friends, to broaden their cultural horizons, and for many other reasons. It is irrational to assume that every Communist who travels

⁹ Cf. the permission that was granted to William Z. Foster to travel to the Soviet Union for medical treatment while he was under indictments for violating the Smith Act. *Foster v. United States*, 364 U. S. 834, was followed by an order of the District Court permitting such travel. Order of Dec. 2, 1960, in Nos. CR 128-87 and CR 128-88, S.D.N.Y.

¹⁰ Sections 6(a) and 15(c) make the applicant similarly liable for the act of applying.

abroad does so to further the purposes of the world Communist movement.¹¹ It is equally irrational to presume that those Communists who travel abroad in furtherance of such purposes will or are likely to engage in or promote unlawful activity.¹² "Communists, we may assume, carry on legitimate political activity." *American Communications Association v. Douds*, 339 U. S. 382, 393: "Assuming that some members of the Communist Party * * * had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct." *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 246. Accordingly, the Court has warned of the danger of punishing a member of the Communist Party "for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not share." *Noto v. United States*, 367 U. S. 290, 299. See also *Yates v.*

¹¹ It is likewise irrational to assume, as section 6 does, that all foreign travel by non-Communist members of Communist-front organizations is for this purpose. The latter presumption is not even supported by the findings of section 2(8) which refers only to travel by "Communist members, representatives, and agents." See *infra*, p. 43.

¹² Appellant Flynn has written of her participation, in 1960, in a Bucharest meeting of the representatives of the Communist Parties of 50 countries and in the Moscow meeting of 81 Communist Parties. *Recollections of the 1960 Conferences*, Political Affairs, No. 1963, p. 22. The article describes the discussions which eventuated in the statement, subscribed to by 81 Communist Parties including the Communist Party of the United States, containing declarations on the non-inevitability of war and on the possibility of bringing about the transition from capitalism to socialism by peaceful means. The article tells of the efforts which were made to persuade the Chinese delegates of the correctness of the positions taken on these subjects. While Miss Flynn's participation in these meetings may be said to have furthered purposes of the world Communist movement, there is nothing in the proceedings which she describes other than legitimate, peaceable activity which, as to her, was of a constitutionally protected character.

United States, 354 U. S. 298, 329-31; *Scales v. United States*, 367 U. S. 203, 229-30.¹³

The supposition of section 6 that every member of the Communist Party promotes its alleged criminal activity is negated by the disposition of Smith Act prosecutions following the decision in *Yates*. Of thirteen conspiracy cases the defendants were discharged in twelve; the other is dormant after two reversals.¹⁴ Of fifteen membership cases, *Scales* alone resulted in a conviction; one ended in an acquittal,¹⁵ and thirteen were dismissed on motion of the government.¹⁷ No further Smith Act indictments have been returned.

¹³ Cf. *Schneiderman v. United States*, 320 U. S. 118, 136: "Men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

¹⁴ In four cases, judgments of acquittal were ordered as to all of the defendants. *United States v. Silverman*, 248 F. 2d 671; *United States v. Jackson*, 257 F. 2d 830; *Huff v. United States and Fujimoto v. United States*, 251 F. 2d 342. In *Yates* and one other case, judgments of acquittal were ordered for some defendants and the indictments were later dismissed by the government as to the others. *United States v. Kuzma*, 249 F. 2d 619. In four cases, the indictments were dismissed by the government after remands for new trials. *Mesarosh v. United States*, 352 U. S. 1; *Wellman v. United States*, 253 F. 2d 661; *Sentner v. United States*, 253 F. 2d 310; *Brandt v. United States*, 256 F. 2d 79. In two cases, the indictments were dismissed by the government before trial. *United States v. Russo* (D.C. Mass.); *United States v. Carrion* (D.C.P.R.).

¹⁵ *Bary v. United States*, 292 F. 2d 53.

¹⁶ *Hellman v. United States*, 298 F. 2d 810.

¹⁷ In *Noto*, *supra*, and two other cases, the indictments were dismissed after re-trials were ordered. *Lightfoot v. United States*, 355 U. S. 2; *United States v. Blumberg* (E.D. Pa.). In ten, the indictments were dismissed before trial. *United States v. Russo* (D.C. Mass.); *United States v. Weiss* (N.D. Ill.); *United States v. Winter*; *United States v. Hall*; *United States v. Thompson*; *United States v. Stachel*; *United States v. Davis*; *United States v. Green*; *United States v. Winston*; *United States v. Gates* (all S.D.N.Y.). Two additional cases terminated upon the death of the defendants. *United States v. Foster* and *United States v. Dennis* (both S.D.N.Y.).

The Act itself recognizes that the world Communist movement may seek to realize its alleged objective in the United States by peaceable, constitutional means. For section 2(6) finds that forcible means will be resorted to only "if necessary." And section 4(a) (50 U. S. C. 783(a)), prohibiting conspiracies to promote the establishment of a foreign-controlled "totalitarian dictatorship" in this country, contains the proviso that "this subsection shall not apply to the proposal of a constitutional amendment."

Finally, the registration proceeding against the Communist Party produced no finding and no evidence that the Party engaged in illegal acts or advocacy. See *infra*, pp. 35-36.

Plainly, as the authors of the Act themselves recognized, the presumption that all members of the Communist Party are likely to endanger the national security whenever they travel abroad is contrary to common experience. Accordingly, the presumption denies due process. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Heiner v. Donnan*, 285 U. S. 312; *Tot v. United States*, *supra*; *Speiser v. Randall*, 357 U. S. 513; *Bailey v. Alabama*, 219 U. S. 219, 239. It also violates the precept of *McFarland*, at 86, that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

B. Section 6 contravenes the decisions of the Court that individual guilt or disqualification may not be conclusively presumed from membership in Communist organizations.

It is an established principle of due process that individual guilt or disqualification may not be conclusively presumed merely from the fact of membership in the Communist Party or organizations considered to be Communist oriented. *Scales v. United States*, *supra*; *Adler v. Board of Education*, 342 U. S. 485; *Wieman v. Updegraff*, 344 U. S. 183. Section 6 must fall under this principle.

Scales at 224-28, sustained the membership clause of the Smith Act only by construing it to require proof not merely that the accused was a member of an organization which incited to violent overthrow of the government, but also that he (1) had knowledge of the criminal activity of the organization, (2) was an "active" member, and (3) himself intended to bring about violent overthrow as soon as circumstances would permit. In answering the arguments of petitioner that the statute violates due process, the Court said (at 228):

"We think, however, they are duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent, which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."

The Court also emphasized, at 229, that since the membership clause requires proof that the accused intended to bring about the overthrow of the government by forcible means, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute."

Although *Scales* dealt with a criminal statute, the decision applies with equal force to the civil disability imposed by section 6. The section denies travel rights to all members of proscribed organizations, including those "for whom the organization is a vehicle for the advancement of legitimate aims and policies" and whose membership is "unaccompanied by any significant action . . . or any commitment to undertake action" in support of alleged unlawful objectives of the organization. Under *Scales* such an indiscriminate disqualification is inconsistent with due process.

Adler v. Board of Education, supra, sustained New York's Feinberg Law, which provided a procedure to dis-

qualify persons for employment in the public schools. The statute authorized the Board of Regents to list organizations found, after a hearing, to advocate the violent overthrow of the government. The statute, as construed by the state court, made membership in a listed organization evidence of disqualification only if the member was found to have knowledge of the organization's unlawful purpose (342 U. S. at 494, n. 8). Moreover, such evidence was not conclusive. The statute accorded the accused teacher a hearing at which he could rebut the *prima facie* presumption arising from his membership and knowledge. As the state court further construed the statute (342 U. S. at 495):

“Once such contrary evidence has been received
*** the official who made the order of ineligibility
has thereafter the burden of sustaining that order by
a fair preponderance of the evidence.”

Under the state court's interpretation, as this Court stated (at 492), the statute applied only to persons holding *unexplained* membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force and violence, and known by such persons to have such purpose” (emphasis, supplied). The Court held (at 495) that, so interpreted, the statute satisfied due process because the presumption of ineligibility arising from membership in the organization with knowledge of its unlawful purpose was not unreasonable and because, “The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.” In short, the New York statute was found to meet the standards of due process only because it contained the protective features which are missing from section 6.

Wieman v. Updegraff, *supra*, invalidated a state statute which lacked these features. This statute required state employees, as a condition of employment, to declare under oath that they were not members of any organization which

had been listed as subversive by the Attorney General of the United States. The Court noted (at 189) that the disqualification in *Adler* was based on membership in a listed organization only when coupled with "knowledge of organizational purpose," whereas (at 190) under the Oklahoma statute, "the fact of membership alone disqualifies." It held this difference decisive of the unconstitutionality of the Oklahoma statute, stating (at 191):

" * * * under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Petitioners' interest in foreign travel is certainly entitled at least to the protection accorded the interest of an individual in public employment.¹⁸ Accordingly, section 6 violates due process because of its "indiscriminate classification of innocent with knowing activity."

C. The executive and legislative experience shows that the conclusive presumption of section 6 is not required by security considerations.

The premise of section 6 is that every member of the Communist Party and of Communist-front organizations must be conclusively presumed to be a security risk. This conclusive presumption is not only arbitrary and in conflict with the decisions of this Court, but is also superfluous to security needs. The latter fact has been recognized by the executive and legislative branches of the government.

¹⁸ The interest in foreign travel should be accorded greater protection. For there is no "right" to public employment in the sense that there is a right to travel. Cf. *Wieman v. Updegraff*, *supra*, at 191-92, with *Kent v. Dulles*, *supra*, at 125-27. And see *infra*, p. 47.

In 1950, The Assistant to the Attorney General, Peyton Ford, wrote the Chairman of the House Committee which was considering the bills that eventuated in the Act.¹⁹ The letter dealt specifically with H. R. 3903, 81st Cong., 1st Sess., making it a crime for a person employed by the federal government or in the performance of a defense contract to be a member of the Communist Party or any organization designated by the Attorney General as subversive. However, the comments of the Department apply with equal force to the conclusive presumption of disloyalty established by section 6. Mr. Ford wrote:

¹⁹ The relevant provisions of the Order are set forth in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 125-29.

The fact that the executive branch does not consider the conclusive presumption of section 6 necessary for security purposes also appears from the passport legislation proposed by the administration after this Court decided the *Kent* case, *supra*, in June 1948. *Kent* left the Secretary without authority to deny passports to persons known or suspected of membership in or other association with the Communist Party.²⁰ A month after the decision, President Eisenhower sent a message to Congress requesting authority to deny passports where their possession "would be inimical to the security of the United States." The mes-

States. Section 104(c) provides that in determining whether an applicant is within the category defined in section 103(6)(iii), the Secretary shall consider as material whether he is a member of the Communist Party. Section 104(c) provided that if the evidence

Ten other bills to regulate the issuance of passports were introduced at the same session.²² Although differing in many respects, with a single exception, they did not make membership in the Communist Party or any other organization conclusive of the applicant's ineligibility for a passport.²³ The Senate took no action on any of these bills. One of them was passed by the House, H. R. 13760, 85th Cong., 2d Sess. (the Selden Bill). It authorized the denial of a passport to a member of the Communist Party only if the Secretary determined that travel by him would endanger the national security. In explaining his bill during the floor debate, Representative Selden emphasized that "the Secretary of State is required to make an affirmative showing that the activities or presence of the person abroad would be harmful to the security of the United States." 104 Cong. Rec. 19654.²⁴

at a hearing shows that the applicant is a member of the Communist Party, the burden is upon him to establish that he is not within the category defined in section 103(6)(iii). Section 105 authorized the Secretary to issue a passport notwithstanding the provisions of sections 103 and 104 where "he deems such action advisable in the national interest." For criticism of the administration bills, by Senators and others, as too harsh, see Hearings before the Committee on Foreign Relations, United States Senate, 85th Cong., 2d Sess., on S. 2770, S. 2998, S. 4110 and S. 4137, *passim*.

²² H.R. 13005, H.R. 13652, H.R. 13699, H.R. 13700, H.R. 13760, H.R. 13761, H.R. 13769, H.R. 13788, S. 2770 and S. 4137, all 85th Cong., 2d Sess.

²³ The exception was S. 2770.

²⁴ The text of the Selden Bill and floor amendments appear at 104 Cong. Rec. 19653-54. The bill was in the form of an amendment to the Passport Act of 1926, 44 Stat. 887. Section 5 found that the "international Communist movement" endangers the security of the United States and that "travel by couriers and agents is a major and essential means by which the international Communist movement is promoted and directed." Section 6 authorized the Secretary of State to deny a passport to any person who is a member of the Communist Party "as to whom it is determined [after the hearing provided for in section 8] that his or her activities or presence abroad would under the findings made in section 5 be harmful to the security of the United States."

A revised version of the Selden Bill was passed by the House at the next Congress. H. R. 9069, 86th Cong., 1st Sess.; 105 Cong. Rec. 18614. Section 6 of this bill specifically provided that, "The Secretary of State shall not deny a passport to any person solely on the basis of membership in any organization, association with any individual or group, adherence to unpopular views, or criticism of the United States or its domestic or foreign policies." The Senate took no action on passport legislation during the 86th Congress, and no further action was taken by either House at subsequent Congresses.

Thus in formulating passport legislation following the decision in *Kent*, the executive branch and the House adopted the view, expressed by The Assistant to the Attorney General in 1950, that the denial of rights or privileges to a member of the Communist Party solely because of his organizational association is not a necessary or desirable element of a national security program. Section 6 does not represent a considered Congressional judgment to the contrary. Instead it appears to reflect the misapprehension that prevailed before *Kent* that there were no constitutional limitations on the powers of Congress and the executive to withhold passports.²⁵

²⁵ The Senate Committee report on the bill that became the Act said with respect to section 6: "The granting of passports is not obligatory in any case and is only permitted where not prohibited by law * * *. Congress has always assumed authority to prescribe the conditions under which passports may be issued." Sen. Rep. No. 1358, 81st Cong., 2d Sess., to accompany S. 2311, p. 26. Similarly, Representative Case, a member of the House Committee on Un-American Activities which reported the legislation to the House, said in the course of the debate: "The issuance of passports, the possession of classified information, are the property, you might say, of the Government. So, I personally feel that the committee is on sound ground in presenting a bill which proposes to deny these persons who are members of these organizations these benefits which are either created or conferred by the Government." 96 Cong. Rec. 13732.

D. Even if the presumption established by section 6 were reasonable, it would be an unconstitutional abuse of governmental power to deny persons the right to travel merely because of a likelihood that they would abuse the right.

Section 6 violates due process even if it is assumed that Congress could reasonably find that every member of a proscribed organization would, when abroad, be likely to engage in unlawful conduct endangering the national security. This is so because the right to travel is a constitutional "liberty," and because no citizen may be deprived of his liberty—at least in peacetime—merely because there are grounds for believing that he will be likely to use it for some unlawful purpose.

Preventive detention—the confinement of persons in anticipation of future misconduct—is a hallmark of tyranny. And this is true whether the confinement is to the limits of a concentration camp²⁶ or the borders of a nation.²⁷ Such practices are repugnant to the concept of the presumption of innocence. Moreover, preventive detention under

²⁶ "[T]hose who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might suspect such acts, but who had not yet committed them were taken into protective custody, and these were the people who were taken to concentration camps." Hermann Goering, quoted by Justice Jackson in *Shaughnessy v. Mezei*, 345 U. S. 206, 225-26, n. 8 (dissenting opinion).

²⁷ "In England, the right to travel freely was sharply contested in the early days of the common law, and was seriously curtailed by statute in the time of Edward III and Richard II; but English subjects eventually triumphed over the claims of the royal prerogative, and the once odious writ of *Ne exeat regnum*, discarded as a weapon of tyranny, evolved into the favorite protection of loyal merchants against absconding debtors." Passports and Freedom of Travel (Note), 41 Geo. L. J. 63, 64. Compare section 6 with the Statute of 3 Charles I, Chap. 2, *id.*, p. 69, which prohibited " * * * the passing and sending of any to be popishly bred beyond the seas."

section 6 is imposed without trial by jury, or a judicial or even an administrative finding that the detainee has criminal propensities.

Under our system, even a person charged with the commission of a crime may not be denied freedom of movement for the purpose of preventing him from committing other offenses. Accordingly, bail for an accused and restrictions on his right to travel must be based exclusively on considerations of what is reasonably required to secure his presence and submission to the judgment of the court. *Stack v. Boyle*, 342 U. S. 1, 4; *United States v. Foster*, 79 F. Supp. 422. This principle is applicable not only before conviction, but pending appeal as well. *Stack v. Boyle*, *supra*; *Williamson v. United States*, 184 F. 2d 280; *Reynolds v. United States*, 4 Law Ed. 2d 46. So, in granting bail to the Communist Party leaders after their conviction for conspiring to violate the Smith Act, Justice Jackson said:

"If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand committed." *Williamson v. United States*, *supra*, at 282-83.

For similar reasons the Court narrowly construed a statute giving the Attorney General supervisory power over aliens awaiting deportation. The text of the statute gave the Attorney General broad authority to supervise the activities of such aliens. But consideration of the "liberties that the Constitution safeguards, even for an alien person," led the Court to limit the Attorney General's au-

thority to such controls as are necessary to assure the alien's availability for deportation. *United States v. Witkovich*, 353 U. S. 194, 201; *Barton v. Sentner*, 353 U. S. 963. See also *Siminoff v. Esperdy*, 267 F. 2d 705.²⁸

In what *Kent* characterized (at 128) as "a case of comparable magnitude," the Court sustained the exclusion during World War II of citizens of Japanese ancestry from prescribed West Coast military areas. *Korematsu v. United States*, 323 U. S. 214. The Court justified the exclusion (at 217-18) only because of "the gravest imminent danger to the public safety" from espionage and sabotage in an area threatened by enemy invasion.²⁹

No remotely comparable danger can arise from the peacetime activities of American Communists abroad. Indeed, Congress did not and could not specify the nature of the supposed danger beyond the vague generality of section 2(8) that foreign travel "is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." Presumably, what Congress feared—and all that it could conceivably fear—was that American Communists, when outside the country and beyond surveillance, would be free to conspire among themselves and with foreign Communists to engage in espionage, sabotage or insurrectionary activity of some sort upon their return to the United States. But no such conspiracy could endanger the national security unless followed by overt conduct in this country.

²⁸ In *Witkovich*, the government argued (see pp. 198-99) that a broad interpretation of the statute was required by "the national interest in avoiding recurrence of past Communist activity for which appellee is being deported," and by the finding of section 2(13) of the Act that "numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes * * * are free to roam the country at will without supervision or control."

²⁹ Significantly, no wartime restrictions were placed on the freedom of movement of other potentially disloyal citizens as, for example, members of the German-American Bund.

where it would be subject to detection, prosecution and punishment. And there is not an iota of evidence to indicate that traditional American methods of dealing with crime, under existing criminal laws, are not eminently capable of coping with any such conduct, assuming that it were to be engaged in by American Communists.

No other major Western democracy imprisons Communists within its frontiers. To do so is contrary to the Universal Declaration of Human Rights, art. 13, par. 2, which declares: "Everyone has the right to leave any country, including his own, and to return to his country." And, as one commentator has observed, "It will certainly not help our role as a model to others that, of all the British Commonwealth countries, the Union of South Africa appears to be the first to plan to bring its passport laws into line with United States legislation to control travel abroad." Parker, *The Right to Go Abroad*, 40 Va. L. Rev. 853, 873.

To sustain the practice, unprecedented under our Constitution, of preventive detention in peacetime would have far-reaching consequences to American democracy. If the "menace" of Communism supplies a constitutional justification for the detention within our borders of its American adherents, the same menace warrants prohibiting them from interstate travel,³⁰ placing them under house arrest, or shipping them off to concentration camps.³¹ And if these

³⁰ "If today the threat of Communism justifies confining within our boundaries any citizen who will not swear that he is not a Communist, tomorrow the same logic will justify control of movement from one state to another, for that is no less useful in communication than travel abroad." BAZELON, J., in *Briehl v. Dulles*, 248 F. 2d 561, 584-85. (dissenting opinion, footnote omitted).

³¹ Title II of the Internal Security Act (50 U.S.C. 811-826) provides for the arrest and detention of persons suspected of being security risks in the event of invasion, declaration of war, or insurrection within this country in aid of a foreign enemy. Under the

measures are held not to offend the Constitution when taken against Communists, they will be applied to others who are found to exhibit tendencies regarded as criminal or "dangerous" by the government in power. Thus we would lose our freedom in the name of defeating the schemes of its supposed enemies. For much as some may wish it otherwise, the truth remains that "the right of every American to equal treatment before the law is wrapped up in the same constitutional bundle with those of these Communists." Justice Jackson in *Williamson v. United States*, *supra*, at 284.

E. The factual assumptions on which section 6 is predicated cannot justify its application to members of the Communist Party because these assumptions are negated by the findings of the Board in the Party case.

As we have seen, the Congressional justification for section 6 is stated in the recitals of section 2. These are that foreign travel by Communists "is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (sec. 2(8)), and that the activities of "the Communist organization in the United States" and the world Communist movement are a clear and present danger to the national security (sec. 2(15)). Both of these legislative findings are belied by the findings which the Board made on the basis of the voluminous evidence adduced in the proceeding which resulted in the registration order against the Communist Party.³² It

original bill, preventive detention was also authorized in case of "imminent invasion" or a Congressional declaration of an "internal security emergency." These provisions were eliminated in the belief that detention was constitutional under the war power only in the event of actual hostilities presenting a clear threat to the national security. See, *The Internal Security Act of 1950* (Note), 51 Col. L. Rev. 606, 651.

³² The Board's findings are contained in its Modified Report on Second Remand of February 9, 1959 (herein called the Report), which appears in the transcript of the record in *Communist Party v. S.A.C.B.*, No. 537, October Term, 1959, pp. 2375-2651. The Report is also an exhibit in the original record filed with this Court in appellant Flynn's case.

follows that, as applied to members of the Communist Party, section 6 violates due process because it deprives them of their liberty for no discernible purpose.

1. The Board found (p. 2644)³³ that the Communist Party was a Communist-action organization as defined by section 3(3) of the Act.³⁴ This ultimate determination was based on the conclusory finding (p. 2644) that the Communist Party "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement." If, as section 2(8) finds, travel from country to country is essential to activities in furtherance of the purposes of the world movement, the Board's conclusory finding would have to be based, in part at least, on subsidiary findings of activities that involve foreign travel. That, however, is not the case.

The Board did not find any significant travel by American Communists to foreign countries after 1936.³⁵ Moreover, the prior instances of foreign travel which it cited were inconsequential. They were mentioned (pp. 2590-2613) in connection with Board findings on the topics of foreign

³³ Page references to the Board's findings are to the record in *Communist Party v. S.A.C.B.*, *supra*, n. 32.

³⁴ Section 3(3) provides: "The term 'Communist-action organization' means * * * any organization * * * which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement. * * *"

³⁵ 1936 was the most recent date on which the Board found (p. 2598) that members of the Communist Party of this country attended Soviet schools. The Report mentioned only four later instances of foreign travel by American Communists. One (p. 2543) was that "a correspondent of the *Daily Worker* is stationed in Moscow." The others concerned travel by appellant Flynn to France and England in 1945, 1949 and 1950 (pp. 2605-06). The Report attached no significance to these visits.

"financial aid," "training," and "reporting" (pp. 2596, 2602, 2613).³⁶ And, as this Court stated, "it does not appear that the Board relied on these three findings to support its ultimate determination." *Communist Party v. S. A. C. B.*, *supra*, at 58.³⁷

Thus the only Board findings of Communist Party activity that had ever involved travel to and from this country were ~~not~~ relied on for the conclusion that the Party operates to further the purposes of the world Communist movement. In contrast, the matters on which the Board did rely for its ultimate determination were unrelated to foreign travel. For example, as the Court stated in the *Party* case (at 59), both the Board and the Court of Appeals "placed significant reliance" on the testimony of Dr. Philip Mosely that over a thirty-year period the announced positions of the Soviet Union and the Communist Party coincided on some forty-five major issues of international policy. As the Court noted (*ibid.*), Dr. Mosely's testimony was based on published documents representative of the respective Soviet and Party views on each issue.

³⁶ Section 13(e) of the Act provides: "In determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration * * * (3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization [which controls the world Communist movement]; and (4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and (5) the extent to which it reports to such foreign government or foreign organization or to its representatives * * *."

³⁷ The Court in the *Party* case (at 57-58) summarized these findings by stating that "the Board found, respectively, that the Communist Party had received financial aid from the Soviet Union and the Comintern and had sent its members to the Soviet Union for training, prior to about 1940, but that there was no evidence that these activities continued after that time, and that the Communist Party 'upon occasion' reports to the Soviet Union."

There was no suggestion in his testimony³⁸ or in the Board's findings (pp. 2580-90) that the identity of views was the result of or had anything to do with foreign travel. On the contrary, the thirty-year period covered by the Mosely testimony did not end until 1951 (Report, p. 2581, n. 92), fifteen years after the last instance of significant foreign travel found by the Board.

Another finding on which the Board relied heavily to support its ultimate determination was (p. 2522) "that in 1944 [the Communist Party] modified its line in conformance with the then line of the Soviet Union as understood by [the Party's] leader Earl Browder; and that in 1945 [the Party] reverted to 'its basic Communist principles' (*supra*) and reemphasized Marxism-Leninism upon the issuance of a statement to the effect that it should do so by a leading foreign spokesman of the world Communist movement." The reference is to the 1944 dissolution of the Communist Party and formation of the Communist Political Association, followed by the reconstitution of the Party a year later. Neither episode involved foreign travel. The Board found (p. 2517) that the 1944 action was inspired by the public announcement of the dissolution of the Communist International the previous year, and (p. 2518) that the reconstitution of the Party was prompted by an article of the French Communist, Duclos, published in a French journal.

These examples could be multiplied, but enough has been said to demonstrate that foreign travel by American Communists played no part in the determination of the Board that the Communist Party serves as the agent of the world Communist movement to further the objectives of the latter in this country. The Board's determination,

³⁸ As the Court stated in the *Party* case (at 64), "Dr. Mosely did not purport on direct examination to establish the thought processes or the political processes by which the Soviet and the Party arrived at their positions, but only that the positions were identical."

therefore, negates the section 2(8) finding that foreign travel "is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement", at least as applied to members of the Communist Party.

2. The findings of the Board concerning the Communist Party likewise contradict the finding of section 2(15) that "the Communist organization in the United States . . . and the nature and control of the world Communist movement" present a danger to the national security. This conclusory finding is based on the findings of section 2(2) and (6) that it is the purpose of the world Communist movement and the action organizations which it establishes in various countries, through the use of espionage, sabotage, terrorism, force, "and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world."

The ultimate objective which section 2 attributes to the world Communist movement is not of itself a "danger" which can provide the constitutional justification for section 6. For however obnoxious a "Communist totalitarian dictatorship" as defined by the Act may be, it is not an evil which Congress has power to prevent so long as the means employed to achieve it are peaceable. "If in the long run, the beliefs established in totalitarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their day." Holmes, J., dissenting in *Gitlow v. New York*, 268 U. S. 652, 673. Moreover, as we have noted (*supra*, p. 19), section 4(a) of the Act recognizes that this is so.

Hence the constitutional justification for section 6 must rest on the findings of section 2(2) and (6) that Communist action organizations of various countries attempt to secure their ultimate objective by forcible or other unlawful means. As the Report of the Board demonstrates, however, there

is no factual basis for this finding in the activities of the Communist Party.

The Report (p. 2644) found that it is the objective of the Communist Party "to install a Soviet style dictatorship in the United States." But there is no finding that the Party has ever used unlawful means to attain this objective. The Report did not find that the Party engages in espionage, sabotage, terrorism, force or violence, or that it is preparing or conspiring to do so. Nor was it found that the Party incites force or violence. At most, the Report (p. 2635) found Party advocacy of forcible overthrow as a matter of abstract doctrine, and the Court so viewed the findings. *Communist Party v. S. A. C. B.*, *supra*, at 56 (majority opinion) and 130-33 (dissent of the Chief Justice).

Advocacy of forcible overthrow as a matter of doctrine, without incitement to action, is constitutionally protected and may not be punished. *Yates v. United States*, 354 U. S. 298; *Noto v. United States*, 367 U. S. 290.³⁹ Accordingly, the Board findings are as bare of unlawful advocacy as they are of unlawful acts. The fact is that the Communist Party was found to be a Communist-action organization on no more substantial grounds than that, in the words of the Court of Appeals, it has an "intellectual affiliation to a cause," the cause of Communism. *Communist Party v. S. A. C. B.*, 277 F. 2d 78, 83. This intellectual affiliation has nothing to do with insurrectionary conspiracies or foreign travel.

The majority in the *Party* case held (at 56) that a finding by the Board that the Communist Party was engaged in unlawful acts or advocacy was not a prerequisite to an

³⁹ It was the inability of the government to meet the standard of proof of unlawful advocacy laid down in these cases that led to the dismissal of the then pending Smith Act indictments against Communists. See, *supra*, p. 18.

order that it register under the Act.⁴⁰ This holding was based on the view that insofar as the registration requirement is concerned the Act "is a regulatory, not a prohibitory statute." However that may be with respect to the disclosure provisions of the Act, it is plainly not true of section 6 which prohibits persons from travelling abroad and punishes them for even applying for passports.

Because section 6 is a "prohibitory statute" its application to members of an organization found to be a Communist-action organization must be conditional upon Board findings which match the findings of section 2(2) and (6) that the organization has engaged in, conspired to commit, or incited unlawful conduct.⁴¹ Since the Board made no such findings concerning the Communist Party, section 6 may not constitutionally be applied to Party members.

II. On its face and as applied, section 6 violates the First Amendment.

On its face and as applied, section 6 restrains speech, press and assembly in a variety of ways.

First, the avowed purpose of section 6, as stated in section 2(8), is to prevent the "communication" among Communists which their travel from country to country makes possible. In this aspect, section 6 places a direct restraint on the speech of American Communists, and on their association with the Communists of other countries.

Second, section 6, as applied, prevents appellants from accomplishing their purposes of travelling abroad to ob-

⁴⁰ But see the dissent of the Chief Justice (at 130-33).

⁴¹ Cf. the observation of Judge Wyzanski in *Freedom to Travel*, Atlantic Monthly, Oct., 1952, p. 68: "The physical contact between men of different nationalities while they exchange ideas, no matter how unconventional, is no evidence of a clear and present danger unless the ideas themselves include a punishable incitement to immediate action."

serve conditions, listen to others, and form opinions on the basis of what they see and hear (R. 9-10, 24). The situation is as if appellants were prohibited from attending lectures or reading books. They are being denied the First Amendment "right to hear." *United States v. C.I.O.*, 335 U. S. 106, 144 (concurring opinion).

It is apparent that section 6 denies a similar opportunity to virtually all those for whom it prohibits foreign travel. "This travel [abroad, to exchange ideas and experiences] does not differ from any other exercise of the manifold freedoms of expression—from the right to speak, to write, to use the mails, to publish, to assemble; to petition. In all these liberties, the principal element is the stretching of the mind to accommodate the growing spirit. * * * Is not freedom to carry on such intercourse the core of our creed? For we cherish this liberty of communication not only for the sake of the traveller and his ideas, but more especially for the growth of the rest of us and our adventurous society." Wyzanski, *Freedom to Travel*, *supra*, at p. 68. In this aspect also, section 6 is a direct restraint on expression and association.

Third, both appellants are writers and public speakers who desire to lecture in Europe and to gather material there for writing and lecturing upon their return (R. 8-10, 23-24). For them, as for a newspaperman, the "right to travel is a part of the freedom of the press." *Worthy v. Herter*, 270 F. 2d 905, 908. Section 6 therefore directly restrains appellants' right to address American audiences and the right of the audiences to hear them.

Finally, because the prohibition of section 6 is predicated on membership in an organization, it is a discouragement of association. Association in an organization engaged in advocacy is within the protection of the First Amendment. Accordingly, governmental measures inhibiting such association, even if only indirectly, are subject to First

Amendment limitations. *Gibson v. Florida*, 372 U. S. 539, 543-44; *N. A. A. C. P. v. Alabama*, 357 U. S. 449; *Bates v. Little Rock*, 361 U. S. 516; *Communist Party v. S. A. C. B.*, *supra*, at 90-91; *American Communications Association v. Douds*, 339 U. S. 382, 402.

In the three respects in which section 6 directly restrains speech, press and association, it also acts as a prior restraint on the exercise of these rights. The section therefore "comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 272 U. S. 58, 70.

A. The restraints imposed by section 6 on persons found to be members of the Communist Party are far broader than required to meet any evil that Congress has power to prevent.

Due process limitations allow the legislature a wide latitude in selecting the means for accomplishing a governmental purpose. *United States v. Carolene Products Co.*, 304 U. S. 144, 151. Because section 6 restrains expression and association, it must satisfy a more demanding standard. In the area protected by the First Amendment, considerations of administrative convenience and efficient enforcement yield to the social interest in the freedoms that the Amendment protects. Hence, legislation in this area is invalid unless the restraint is no broader than the abuse to which it is directed. *Shelton v. Tucker*, 364 U. S. 479, 488-89.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N. A. A. C. P. v. Button*, 371 U. S. 415, 433. "Broad prophylactic rules in the area of free expression are suspect. * * * Precision of regulation must be the touchstone in an area so closely touching our

most precious freedoms." *Id.* at 438. As stated in *Skelton v. Tucker, supra*, at 488 (footnotes omitted):

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

For these reasons, legislation punishing a bookseller for the bare possession of an obscene book cannot be sustained on the ground that a narrowly drawn law requiring proof of scienter would be susceptible of easy evasion. *Smith v. California*, 361 U. S. 147. The state may not "burn the house to roast the pig" by proscribing the sale of books to all because they tend to corrupt the morals of children. *Butler v. Michigan*, 352 U. S. 380, 383. It may not prohibit the distribution of anonymous leaflets the better to control fraud, false advertising and libel. *Talley v. California*, 362 U. S. 60. Nor will the state's interest in preventing barratry sustain a statute which prevents the solicitation and subsidization of litigation as part of an activity which the Amendment protects. *N. A. A. C. P. v. Button, supra*.

The principle of these cases was applied in *De Jonge v. Oregon*, 299 U. S. 353, which held that the assumption that the Communist Party advocates forcible overthrow cannot justify a statute proscribing participation in its meetings for peaceable political action. It was applied again in *Scales v. United States*, 367 U. S. 203, which sustained the membership clause of the Smith Act only because the Court believed that, as construed, it was narrowly tailored to fit unprotected association and expression. Thus the Court stated (at 229):

... the membership clause, as here construed, does not cut deeper into the freedom of association

than is necessary to deal with 'the substantive evil that Congress has a right to prevent.' *Schenck v. United States*, 249 U. S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' *Noté v. United States*, *post*, p. 290. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute * * *. (Bracketed matter in the original.)

Section 6 obviously runs afoul of the rule of the foregoing decisions. In the name of preventing some Communists from travelling abroad for conspiratorial purposes, it bars all Communists from travelling abroad for the purpose of learning and communicating their observations to others. Since section 6 applies irrespective of the absence of guilty intent and knowledge, and even of organizational activity, it reaches "the members for whom the organization is a vehicle for the advancement of legitimate aims and policies" (*Scales* at 229). Again, the restraints of the section are imposed on persons because of their association with an organization which has *not* "been shown to have engaged in illegal advocacy" or conduct (*ibid.*; see *supra*, p. 36). For all these reasons, section 6 does "cut deeper into the freedom of association [and expression] than is necessary to deal with 'the substantive evils that Congress has a right to prevent'" (*ibid.*).

This vice of section 6 is aggravated by the fact that the section imposes a prior restraint on expression and association. The Court has summarized the classic decision on this subject in *Near v. Minnesota*, 283 U. S. 697, as follows:

"Minnesota empowered its courts to enjoin the dissemination of future issues of a publication be-

cause its past issues had been found offensive* * *. This was enough to condemn the statute." *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 445.⁴²

Section 6 goes further. It imposes a prior restraint on the exercise of First Amendment rights by persons who have never abused them and who know of no such abuse by the organization of which they are found to be members.

The prior restraint of section 6 is more repressive than the licensing systems condemned in *Loyell v. Griffin*, 303 U. S. 444; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Niemotko v. Maryland*, 340 U. S. 268; *Kunz v. New York*, 340 U. S. 290; and cf. *Staub v. Barley*, 355 U. S. 313. These cases invalidated legislation which vested an official with uncontrolled discretion to license the use of the streets and thereby empowered him to prohibit their use for protected purposes. Section 6 goes to the other extreme. It denies the Secretary any discretion and casts its prohibition in terms that are at once so inclusive and so rigid as necessarily to encompass travel for protected purposes.

Section 6 also violates the rule of *Speiser v. Randall*, 357 U. S. 513, that in proceedings to enforce a statute which inhibits the exercise of First Amendment rights, the state is constitutionally required to bear the burden of proving facts justifying the application of the inhibition to the individual in question. The statute in that case was invalidated because it cast the burden of proof on the individual. Section 6 goes further. It dispenses with such proof altogether. Instead, it establishes a conclusive presumption of unfitness to travel which arises from nothing but an association which may be entirely innocent. As stated in *Speiser*, at 529, the government "clearly has no such com-

⁴² See also, *Donaldson v. Read Magazine*, 333 U. S. 178; *Milwaukee Publ. Co. v. Burleson*, 255 U. S. 407, 421 (dissenting opinion).

elling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech."

B. Section 6 imposes other invalid restraints on the exercise of First Amendment rights.

The restraints of section 6 are not confined to persons found to be members of the Communist Party. They prevent the free exercise of expression and association by a far wider body of citizens. None of the latter is today before the Court. But "the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution." *Smith v. California*, 361 U. S. 147, 151, and authorities there cited. Accordingly, it is pertinent to consider the impact of section 6 upon persons other than those in appellants' position.

1. Section 6 denies passports to all members of organizations which have been finally ordered to register as Communist-fronts. The Act's definition of fronts (sec. 3(4)) reaches organizations having a membership preponderantly composed of non-Communists. See sec. 2(7).⁴³ Such persons are not among the "Communist members, representatives, and agents" referred to in the justification which section 2(8) advances for section 6. And the Act

⁴³ " * * * the theory of the statute respecting Communist fronts is that the Communists disguise their true objectives and foster organizations with declared objectives which are attractive. The statute recites that this practice draws support from persons who would not lend such support if they were aware of the true situation. Thus, almost by definition, many members of a Communist front are unsympathetic to Communist aims or Communist philosophy." *National Council of American-Soviet Friendship v. S.A.C.B.*, 322 F. 2d 375, 379.

does not and could not advance any legitimate reason for denying them the right to travel. Yet section 6 punishes them if they even apply for passports.⁴⁴

2. By reason of section 6 and the final registration order against the Communist Party, the right to travel is denied not only to persons who are members of that organization within the conventional meaning of "member," but also to all those who may be found to be members under the vague and expansive indicia of membership set forth in section 5 of the Communist Control Act, 50 U. S. C. 844, and in *Killian v. United States*, 368 U. S. 231. Section 5 and *Killian* make the "membership" of an individual depend on such considerations as whether he ever attended any type of gathering of the Communist Party; ever conferred with other "members" "in behalf of any plan or enterprise" of the organization; ever "advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members" of the organization, or to anyone else in its behalf; ever indicated in any way a willingness to carry out in any manner and to any degree the plans, objectives or designs of the organization, or ever participated in any other way in its activities or planning. Under these indicia of "membership," almost anyone may be denied the right to travel on the ground that he is a member of the Communist Party.

3. Section 6(b) requires the Passport Office and the Secretary, under pain of criminal penalties, to withhold a passport from any person who they have "reason to believe" is a member of a Communist-action organization. Accordingly, they must in self-protection refuse passports

⁴⁴ On December 17, 1963, the Court of Appeals for the District of Columbia affirmed Board orders requiring four organizations to register as Communist-front organizations. *American Committee for Protection of Foreign Born v. S.A.C.B.*; *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*; *Jefferson School of Social Science v. S.A.C.B.*; *Weinstock v. S.A.C.B.* (affirming order against United May Day Committee); none yet reported.

on evidence less than that which would support a finding of membership.⁴⁵ By the same token, this provision operates to deter persons from associating with proscribed organizations in ways short of membership.

4. Section 6 inevitably inhibits any person who is unwilling to jeopardize his travel rights from associating with any organization against which registration proceedings are pending, threatened or thought likely.

5. By denying members of proscribed organizations and others the opportunity to acquire information and ideas abroad, section 6 denies the First Amendment rights of their potential listeners and readers by curtailing the latter's access to such knowledge.

The restraints of section 6 on freedom of expression and association are intensified by the fact that the standards for determining whether an organization is an action or front organization focus on views and policies and their expression. See secs. 13(e) and (f) and *Communist Party v. S.A.C.B.*, *supra*, at 58-59. This is also true of the indicia of membership in the Communist Party contained in section 5 of the Communist Control Act. Presumably, similar indicia will be applied by the Secretary in determining whether a passport applicant is a "member" of a given front organization. The consequences on the First Amendment rights of all citizens was described by President Tru-

⁴⁵ Thus, although section 6 applies only to persons who are members of proscribed organizations at the time they apply for or use passports, the Department's official passport application form (DSP-11) requires applicants to certify (emphasis supplied): "I am not and have not been at any time during the period of 12 full calendar months preceding the date of this application * * * a member of any organization registered or required to register as a Communist organization under Section 7 of the Subversive Activities Control Act of 1950, as amended."

man when he vetoed the Act (H. R. Doc. No. 708, 81st Cong., 2d Sess., p. 5):

"And what kind of effect would these provisions have on the normal expression of political views? Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

Section 6 thus imposes severe and indiscriminate restraints on the First Amendment freedoms of many American citizens, Communist and non-Communist. These restrictions serve no public interest. They have their source in nothing more substantial than the unreasoned fears which the stresses of the cold war have engendered. Neither the clear and present danger test nor the balancing test can reconcile section 6 with the first Amendment.

C. *American Communications Association v. Douds*, if correctly decided, is inapplicable.

The opinion of the District Court (R. 50, 52-53) leaned on *American Communications Association v. Douds*, 339 U. S. 382. That case sustained the constitutionality of section 9(h) of the Taft-Hartley Law, requiring trade union officers to execute non-Communist affidavits as a condition of their union's access to the facilities of the National Labor Relations Board. *Douds* held that section 9(h) did not violate the First Amendment because its limited "discouragement" of the exercise of protected political rights was outweighed in the constitutional balance by the interest of the government in protecting interstate commerce from the threat of political strikes, which Congress found were fomented by Communists in positions of trade union leadership.

We believe that the decision in *Douds* was wrong. In any event, it is inapplicable for a number of reasons.

First, *Douds* found (at 396, 399) that section 9(h) had only a tangential effect on First Amendment rights. Section 6, as we have shown, is a direct restraint upon their exercise. Accordingly, the distinction observed in *Speiser v. Randall*, *supra*, at 527, between section 9(h) and the statute there invalidated is applicable to section 6.

Second, section 9(h) did not prohibit a member of the Communist Party from holding trade union office but subjected him only to possible loss of position (*Douds* at 390). Furthermore, "the loss of a particular position is not the loss of * * * liberty" (*id.* at 409). Section 6, in contrast, prohibits members of proscribed organizations from traveling abroad (or even from applying for permission to do so), and thereby denies them liberty in the constitutional sense: *Kent v. Dulles*, *supra*, at 125.

Third, the "discouragements" of section 9(h) did not apply to all members of the Communist Party, but were directed "only against the combination of those affiliations * * * with occupancy of a position of great power over the economy of the country" (*Douds* at 403-04).⁴⁶ Section 6, on the other hand, applies to all members of proscribed organizations merely by virtue of their membership, and thus denies travel rights to persons who are powerless to injure the economy or security of the country, even given the unwarranted assumption that they have the desire or propensity to do so.

Fourth, section 6, unlike 9(h), does not touch "only a relative handful of persons, leaving the great majority of

⁴⁶ As stated by Justice Jackson, "Also, the [Taft Hartley] Act does not require or forbid anything whatever to any person merely because he is a member of, or is affiliated with the Communist Party. It applies only to one who becomes an officer of a labor union." *Douds* at 434 (concurring opinion).

persons of the identified affiliations * * * free from restraints" (*Douds* at 404). On the contrary, section 6 restrains all members of proscribed organizations, and its "discouragements" affect many others who are not members. Unlike 9(h), therefore, it *does* involve "the elements of censorship" and "prohibition of the dissemination of information" (*id.* at 403).

Finally, *Douds* (at 387-89) found no reason to question the Congressional findings, with respect to the activities of Communists in positions of trade union leadership, which supplied the legislative justification for section 9(h). Here we have shown that the findings which Congress made to justify section 6 are negated as to the Communist Party by the Board's findings in the registration proceedings. Moreover, the Congressional findings, on their face, do not support the denial of passports to non-Communist members of front organizations. See *supra*, pp. 32-37, 43-44.

In short, none of the grounds advanced in *Douds* to sustain section 9(h) is applicable to the present case.

III. Section 6 violates procedural due process and is a bill of attainder because it makes the 1953 finding of the Board that the Communist Party was a Communist-action organization conclusive upon appellants as to the present character of the Party.

The Secretary introduced no evidence in the administrative proceeding to prove, and made no finding, that the Communist Party is a Communist-action organization within the Act's definition of that term. Instead, he sustained the revocation of appellants' passports in reliance upon the final order of the Board requiring the Party to register as a Communist-action organization. The Board issued this order in 1953 on the basis of hearings that were closed in 1952 except for issues going to the credibility of wit-

nesses previously heard. *Communist Party v. S. A. C. B.*, *supra*, at 19-22.

In 1962, therefore, appellants were denied the right to travel because of a determination as to the character of the Communist Party made ten years earlier in a proceeding to which they were not parties. This procedure is undoubtedly required by section 6(b) of the Act, which makes it unlawful for an officer of the United States to issue a passport to a person who he has reason to believe is a member of an organization as to which "there is in effect a final order of the Board" requiring registration as a Communist-action organization. In this respect, however, section 6(b) violates the due process principle that persons may not be deprived of liberty or property without a hearing at which they may contest the factual premises on which the validity of the deprivation depends. *Noto v. United States*, 367 U. S. 290, 299; *Renaud v. Abbott*, 116 U. S. 277, 288. Cf. *Kirby v. United States*, 174 U. S. 47.

The authors of the Act recognized that this due process requirement was applicable to criminal prosecutions under section 6(a). For 6(a) requires the government to prove not only, as under 6(b), that the organization of which the accused is a member has registered or been ordered to register as a Communist organization, but also that it is "a Communist organization as defined in paragraph (5) of section 3."⁴⁷ Due process similarly requires a hearing on the character of the organization in civil proceedings for the denial of passports under section 6(b).

In the present case, the claim that the Secretary's action is constitutional depends on the correctness of the premise that the Communist Party was a Communist-action organization at the time his action was taken. Hence even if it

⁴⁷ Section 5(a) (50 U.S.C. 784(a)) requires similar proof of the character of the organization in a prosecution for applying for or holding a forbidden job.

could be said that appellants, having been found to be members of the Communist Party, are bound by the Board's 1953 determination, they would still be entitled to a hearing on the present character of the organization. At a minimum, due process required that petitioners be given an opportunity to prove that the Board's 1953 finding is no longer tenable. Nothing is more arbitrary in this changing world than a conclusive presumption that a condition, once found, will continue to exist in perpetuity. It is therefore a principle of due process that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U. S. 144, 153; *Chaistleton Corporation v. Sinclair*, 264 U. S. 543; *Baker v. Carr*, 369 U. S. 186, 214. The rule of these cases is of particular significance here. For, as the Chief Justice observed in dissenting in the *Party* case (at 134, n. 11), even the Board's 1953 finding was based on a presumption of continuity which "is certainly dubious," applied to "stale evidence" of Party activities prior to 1940.⁴⁸

The court below dismissed this branch of our argument with the statement (R. 48), "There has been no evidence offered or adduced, that the 'leopard' of the world Communist movement has changed a single spot in the past thirteen years nor would common sense nor common knowledge indicate any such change." But section 6(b) does not permit evidence to be adduced of a change in the world Communist movement or in the character of the Communist Party. And the issue may not be resolved by "common knowledge."⁴⁹ *Ohio Bell Telephone Co. v. P. U. C.*, 301

⁴⁸ The majority (at 69) refused to pass on the sufficiency of this evidence.

⁴⁹ In fact, it is now "common knowledge" that the concept expressed in section 2 of the Act that the world Communist movement is a monolithic organization under the iron control of Moscow is a myth.

U. S. 292, 301-02; *Chastleton Corporation v. Sinclair, supra*. It is precisely for these reasons that section 6(b) violates procedural due process.

The court below also based its holding that the Board's 1953 determination was binding on petitioners on what it thought was the failure of the Communist Party "to utilize the procedures under section 13(b)" for a redetermination of its status (R. 48). The procedure referred to is not available to the Party, however. Section 13(b) and (i) permits an organization which has registered as a Communist organization to make annual application to the Board for cancellation of its registration on a showing that it no longer has the characteristics which had been attributed to it by the Board. This provision, however, applies only to registered organizations. No provision of the Act permits an unregistered organization or its members to secure a redetermination of the organization's status.

The Communist Party did not register but has litigated the requirement that it do so, raising the constitutional questions which were held premature in the *Party* case (at 106-07). The Court of Appeals recently reversed the Party's conviction for failure to register. *Communist Party v. United States*, No. 17583, C. A. D. C., Dec. 17, 1963, not yet reported. If this decision stands and the Party refrains from registering in reliance upon it, members of the Party can never escape the effect of the Board's 1953 determination.

The majority in the *Party* case relied on section 13(b) and (i) in holding that the Act is not a bill of attainder. Citing these provisions, the Court said (at 87): "Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuously contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of the de-

scribed character." This observation is plainly not true of the application of section 6 to appellants, which *does* turn on "the past and ineradicable actions" of the Communist Party. For that reason, section 6, as applied, not only violates due process but is a bill of attainder.

CONCLUSION

The judgment below should be reversed

Respectfully submitted,

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APPENDIX—STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781, *et seq.*, as amended, provides in part as follows:

NECESSITY FOR LEGISLATION

SEC. 2. [781]* As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

* Numbers in brackets are the section numbers of 50 U.S.C.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts," which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts."

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objec-

tives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication

that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. [782] For the purposes of this title—

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

**DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST
ORGANIZATIONS**

SEC. 6. [785] (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for

any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

SEC. 7. [786] (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

REGISTRATION PROCEEDINGS BEFORE BOARD

SEC. 13. [792] • • •

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the

annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief, may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title • • •

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organiza-

tion, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; • • •

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

JUDICIAL REVIEW

SEC. 14. [793] • • •

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. [794] (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.